No. 95-428

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CITY OF COLORADO SPRINGS and CITY OF AURORA, COLORADO, MUNICIPAL CORPORATIONS,
Petitioners,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

BRIEF IN OPPOSITION OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a Colorado municipality has standing to assert a takings claim against another Colorado state entity in a Colorado state court.

2. Whether federal law implicitly pre-empts all state and local environmental regulation of a municipal water project located on federal land.

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BRIEF IN OPPOSITION OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO

The respondent Board of County Commissioners of Eagle County, Colorado (the "Board" or "Eagle County"), respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the opinion of the Colorado Court of Appeals in this case. That opinion was reported at 895 P.2d 1105 (1994), and has been reprinted in the appendix to the petition for writ of certiorari ("Pet. App.") at 1a.

COUNTERSTATEMENT OF THE CASE

Petitioners, the cities of Colorado Springs, Colorado, and Aurora, Colorado ("Cities"), applied for a permit from Eagle County under the Colorado Land Use Act,

Colo. Rev. Stat. § 24-65.1-101, *et seq.*, for construction of a system of water diversion structures to be located in the Eagle River Basin within Eagle County (the so-called Homestake Water Project). After a lengthy hearing, Eagle County denied the Cities' application, finding, among other things, that the project as proposed by the Cities would significantly deteriorate wetlands in violation of Eagle County regulations. Upon judicial review, the Colorado Court of Appeals held that there was competent evidence to support Eagle County's decision to deny the permit. The Colorado Supreme Court denied the Cities' subsequent petition for review on certiorari. The Cities seek this Court's review.

A. Regulation of Municipal Water Projects Under Colorado Law.

The Cities' proposed Homestake Water Project is a municipal water project involving the exercise of water rights held by the Cities under Colorado law. The Cities' water rights authorize the diversion of a prescribed amount of water from the Eagle River Basin. The manner and method of the Cities' appropriation of that water, however, is subject to regulation by the Colorado General Assembly. *See Central Water Conservancy Dist. v. Simpson*, 877 P.2d 335 (Colo. 1994).

In 1974, the Colorado General Assembly amended the Colorado Land Use Act to provide for regulation of certain matters of state interest, including the site selection, construction, and efficient utilization of municipal water projects. Colo. Rev. Stat. §§ 24-65.1-101, -203. By this enactment, the General Assembly delegated authority to county governments to directly regulate the environmental impacts of the construction and efficient utilization of municipal water projects. The county governments were to implement the statutory scheme through a permit program enacted and administered under statutory guidelines. Colo. Rev. Stat. §§ 24-65.1-401, -402,

-501. As noted by the Colorado Court of Appeals, *see* Pet. App. 5a-6a, Eagle County has developed such a permit program for the regulation of municipal water projects.

The Colorado Supreme Court has ruled that the statutory scheme provided in the Colorado Land Use Act for county regulation of matters of state interest is a constitutional delegation of legislative authority. *City and County of Denver v. Board of County Comm'rs*, 782 P.2d 753, 760, 763 (Colo. 1989). The court has further held that home rule cities, such as petitioners, are not insulated from regulation under the Colorado Land Use Act when they construct water projects in the exercise of their water rights. *Id.* at 764-65.

B. The Cities' Federal Permit Applications.

The Cities' proposed location for the Homestake Water Project—on federal land within the White River National Forest and the Holy Cross Wilderness—required the Cities to obtain certain federal approvals, which they elected to pursue before they applied for the permit from Eagle County under the Colorado Land Use Act. *See, e.g.*, Pet. at 7. First, although a statutory exemption saved the Cities' water project from an outright ban under the Colorado Wilderness Act, *see* Pub. L. 96-560, § 102(5), 94 Stat. 3265, 3266 (1980), the Cities nevertheless had to obtain an easement from the United States Forest Service pursuant to the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1761-1771. Second, because the Cities' proposed project would involve the discharge of dredged or fill material into wetlands that are part of the waters of the United States, authorization had to be obtained from the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. Both of these federal statutes and their implementing regulations require the Cities, as federal permittees, to comply with applicable state environmental protection requirements. *See* 33 U.S.C. § 1344; 43 U.S.C.

§ 1765; 33 C.F.R. § 320.4(g), (j); 36 C.F.R. § 251.56. In addition, pursuant to Executive Order 11,990 (May 24, 1977), any grant of an easement through federally owned wetlands must identify any uses of the easement that may be restricted under state or local wetland regulations.

The Cities obtained their federal approvals. However, consistent with the statutory and regulatory requirements and Executive Order 11,990, both the FLPMA easement issued by the Forest Service and the Section 404 permit issued by the Corps of Engineers prescribed conditions that either mandated compliance with state and local permitting requirements or made it clear to the Cities that federal approval did not obviate the requirement to obtain state or local permits under Colorado law. *See* Pet. App. 63a, 111a.

C. The Cities' State Permit Application.

In 1985, the Cities submitted an application for Eagle County's approval of a proposed system of water diversion and conveyance structures within the drainage of two tributaries to the Eagle River, Fall Creek and Cross Creek. As previously noted, *supra* p. 3, the Cities elected to seek authorization from Eagle County only after they had obtained the required federal permits.

In 1987, Eagle County held a public adjudicatory hearing on the Cities' application. Before it began, however, the Cities moved to restrict the scope of the hearing, filing a motion *in limine* that asserted that Eagle County lacked authority to consider alternatives to the specific project features proposed in the Cities' application. As noted by the Colorado Court of Appeals, *see* Pet. App. 25a, the hearing record is very clear that the Cities had no intention of altering any features of their project. In short, at their own election, the Cities' application was a "take it or leave it" proposition. Eagle County granted

the Cities' motion to restrict the scope of review of the application, thus foreclosing any review of the large number of potential alternatives to the project, some of which had been identified by the Cities and reviewed by the Forest Service during the federal permitting process.

As a consequence of the Cities' motion *in limine* and the Board's action thereon, the application review process did not involve a categorical determination of whether the Cities could exercise their water rights within the Eagle River Basin. Instead, the Board's review was confined to determining whether the specific project features described in the Cities' application would result in unacceptable environmental impacts. As noted by both the trial court and the Colorado Court of Appeals, *see* Pet. App. 23a, 186a, Eagle County's action on the Cities' permit application would affect the proposed project only and not the right of the Cities to construct and operate a water project within the boundaries of Eagle County.

As described in a transcript that runs to nearly 4,000 pages in length, the hearing involved extensive expert testimony and a large number of exhibits. Much of that evidence addressed the impact of the proposed project on wetlands within the Cross Creek and Fall Creek drainages. In the end, the Board unanimously denied the Cities' permit application, finding, among other things, that the project as proposed by the Cities would significantly deteriorate wetlands in the Fall and Cross Creek drainages in violation of Eagle County regulations that prohibited the significant deterioration of wetlands without adequate mitigation. *See* Pet. App. 145a, 147a, 150a.

D. Judicial Review of Eagle County's Action.

Following the Board's denial of the Cities' permit application, the Cities commenced an action for judicial review in the District Court of the Fifth Judicial District, State of Colorado. In total, the Cities' amended complaint in the District Court asserted fifteen claims for relief, includ-

ing claims that (i) the actions of Eagle County constituted regulatory takings without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II of the Colorado Constitution, and (ii) the regulations that Eagle County had relied upon in denying the Cities' application were pre-empted by federal law. The District Court dismissed the Cities' takings claims, concluding that the Cities lacked standing to assert such claims. Pet. App. 162a-72a. The District Court further held that some, but not all, of the regulatory grounds supporting Eagle County's action were pre-empted. Pet. App. 186a-88a. The District Court remanded the case to the Board for further consideration. *See* Pet. App. 211a.

Eagle County appealed the District Court's decision, contending, among other things, that (i) the District Court erred in finding that certain of the Eagle County regulations were pre-empted, and (ii) in any event, the regulatory grounds that the District Court found were not pre-empted were supported by competent evidence and, by themselves, required the Board to deny the Cities' application. The Cities cross-appealed on the District Court's dismissal of the Cities' takings claims. *See* Pet. App. 242a-43a.

On review, the Colorado Court of Appeals held that the record of proceedings before the Board contained competent evidence to support its determination that the Cities had failed to meet the applicable permit issuance criteria. Pet. App. 21a, 32a. The Court of Appeals noted that the record contained extensive testimony to support the finding that the Cities' plan to mitigate the impact of their water diversion in the affected wetlands was deficient and would be ineffective to prevent a substantial destruction of certain plant species in the area. Pet. App. 7a. The Court concluded that, in view of the mandate of the Colorado Land Use Act that a permit must be denied if all regulatory criteria cannot be met, the Cities' application must be denied. Pet. App. 6a-8a.

The Court of Appeals further held that the Cities' entitlement to take water from the Eagle River was not an absolute right to build and operate any particular water diversion project. Pet. App. 21a. In light of the limited nature of the Board's ruling (based on the Cities' own motion *in limine*), the Court of Appeals noted that the Cities were not barred from resubmitting a modified application or a different proposal. *Ibid.*

Finally, the Court of Appeals affirmed the District Court's dismissal of the Cities' takings claims on a number of grounds, including the Cities' lack of standing to pursue such claims. Pet. App. 29a-32a.

Because Eagle County's denial of the Cities' application was being sustained by the Court of Appeals solely on grounds that the District Court had found not to be pre-empted—a ruling that the Cities did not challenge on appeal—the Court of Appeals expressly declined to reach any issues of federal pre-emption. *See* Pet. App. 8a.

Rather than amend their application to propose an alternate configuration of their water project, the Cities sought review of the Court of Appeals' decision. On June 6, 1995, the Colorado Supreme Court denied the Cities' petition for writ of certiorari. *See* Pet. App. 214a-16a.

REASONS FOR DENYING THE WRIT

The petition presents two questions. The Cities first ask this Court to decide whether the Colorado Court of Appeals erred in ruling that the Cities lacked standing to assert takings claims against Eagle County in a Colorado state court. In effect, the Cities are asking this Court to consider overturning its own settled law regarding Fourteenth Amendment rights of state subdivisions in order to reach an issue of Colorado law regarding the standing of Colorado municipalities to bring claims in a Colorado state court. There is no reason for this Court to engage in such an extraordinary violation of *stare decisis* and federalism.

The Cities next ask this Court to decide whether federal law implicitly pre-empts all of Eagle County's attempts to regulate environmental effects of the Cities' water project. That issue was never raised in the Colorado Court of Appeals, and the Cities have not said why this Court should exercise its jurisdiction under 28 U.S.C. § 1257 to decide such an issue that was "not pressed or passed upon below," particularly where the federal statutes, regulations, and executive order that apply to this matter all expressly contemplate state and local regulation in these circumstances.

I. THE CITIES' STANDING TO ASSERT A TAKINGS CLAIM IN A COLORADO STATE COURT AGAINST ANOTHER STATE ENTITY IS NOT AN APPROPRIATE ISSUE FOR THIS COURT'S REVIEW.

A. The courts have consistently rejected the contention that a state subdivision, such as a municipality, has a federal constitutional right against uncompensated takings by another of that state's subdivisions.

The Cities state that a "genuine conflict currently exists" about whether one subdivision of a state may assert a federal takings claim against another subdivision. *See* Pet. at 10. But that's wrong. Since *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), this Court has repeatedly counseled that the Constitution of the United States does not interfere with a state's internal political organization. This Court has remained faithful to the principles of *Dartmouth College* in its construction of the Fourteenth Amendment, holding that a state subdivision, such as a municipal corporation, is merely a creature of the state, and is not a "person" that may assert its own Fourteenth Amendment rights against the will of its creator. *See Coleman v. Miller*, 307 U.S. 433, 441 (1939). The subdivision's inability to bring claims against its creator under the Fourteenth Amendment also operates to bar takings claims that are based on the Just Compensation Clause of the Fifth

Amendment, which applies as a constraint on the states through the Fourteenth Amendment. *See, e.g., City of Trenton v. New Jersey*, 262 U.S. 182, 183, 188 (1923). Moreover, the subdivision's inability to assert Fourteenth Amendment rights against its creator extends to suits directed against other subdivisions of the creating state. *See, e.g., South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 505 (6th Cir. 1986); *Village of Arlington Heights v. Regional Transp. Auth.*, 653 F.2d 1149, 1153 (7th Cir. 1981); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980).

Contrary to the Cities' suggestion, *see* Pet. at 10, recent opinions in the lower courts have not questioned the continuing validity of the well-settled law that a state subdivision has no federal constitutional rights against uncompensated takings by its creator or a subdivision thereof. In fact, the cases cited by the Cities expressly point out the absence of any support for such takings claims. *See, e.g., Board of Levee Comm'rs v. Huls*, 852 F.2d 140, 142-43 (5th Cir. 1988) (in holding that "an agency of the state [may not] sue the state under the Fifth and Fourteenth Amendments for an uncompensated taking of property," the court said that it could not discover *any* case that "ever found that a political subdivision properly asserted its constitutional rights to just compensation against its state"); *Rogers v. Brockette*, 588 F.2d 1057, 1067-68 (5th Cir.) (observing that federal courts have "invariably" ruled against "the municipality's claim that the state action violated the municipality's rights under . . . the just compensation clause"), *cert. denied*, 444 U.S. 827 (1979). The Cities cite just one state court opinion, *New Castle County School Dist. v. State*, 424 A.2d 15 (Del. 1980), that even *suggests* that it might entertain such a claim. *See* Pet. at 12-13. A closer examination of that case, however, reveals that the takings claims asserted therein had been raised under both state and federal constitutions, and the defendant

state did not dispute plaintiff's contention that compensation would be required if the court found that the property that was being "taken" by the state had been held by the plaintiff in its proprietary rather than governmental capacity. *See* 424 A.2d at 16-17. The court consequently never had to reach any issue about the applicability of federal takings law. Such a case can hardly be said to establish a "genuine conflict" in federal constitutional law that this Court must now resolve.

B. The federal law of standing does not determine whether a Colorado municipality may assert a takings claim against another Colorado state subdivision in a Colorado state court.

The Cities casually dismiss this Court's teachings in *Dartmouth College* and its progeny with the facile observation that, "when these cases were decided, 'standing' meant something different from what it means today." *See* Pet. at 19-20 (citing *Rogers*, 588 F.2d at 1057). The Cities apparently believe that a change in the federal law of standing somehow undercuts two hundred years of case law regarding the constitutional rights of state entities.

The Cities are confused. First, changes in the federal law of standing—that is, changes in the law about who might be an appropriate party to bring a particular claim in federal court—do not themselves create new constitutional rights in municipalities against uncompensated takings by other state entities. This Court's holding in *City of Trenton* remains good law.

Second, this case was filed in a Colorado state court, and is therefore governed by that state's rules of standing, which need not be—and, as it happens, are not—identical to the rules of standing to assert claims in a federal court that exercises its jurisdiction under Article III of the Constitution of the United States. *Wimberly v. Ettenberg*, 570 P.2d 535, 537-39 (Colo. 1977).

C. The Cities' status as "home-rule" cities under the Colorado constitution does not undermine the reasoning of the Colorado Court of Appeals and, in any event, raises no federal issues for this Court's review.

The Cities suggest that, because they are "home-rule" cities under the Colorado constitution and therefore have certain powers that may not be abrogated by the Colorado General Assembly, their takings claims relate to vested rights that are constitutionally protected from infringement by the state. *See* Pet. at 21. But they're wrong. As the Colorado Court of Appeals recognized, *see* Pet. App. 30a-31a, it is only in matters of purely local concern that the powers of a home-rule city supersede the powers of the Colorado General Assembly. *See, e.g., City and County of Denver v. Board of County Comm'rs*, 782 P.2d at 762. In matters of mixed state and local concern, the powers of the Colorado General Assembly will always control and supersede any conflicting powers of a home-rule city. *Ibid.* In this regard, the Colorado Supreme Court has expressly and specifically found that a home-rule city's construction and operation of a water project in Eagle County is a matter of mixed state and local concern, such that the Colorado General Assembly's delegation to Eagle County of regulatory authority over that water project does not improperly infringe on the home-rule city's right, under the Colorado constitution, to construct and operate waterworks. *Id.* at 761-63.

Eagle County's exercise of its delegated state power cannot now be attacked on the basis that a home-rule city has some sort of inalienable right to be free from such state control—much less a right that is enforceable through the Fourteenth Amendment to the Constitution of the United States. *Cf. Village of Arlington Heights*, 653 F.2d at 1152-53 (holding that, although the home-rule provisions of the Illinois constitution changed the relationship of the state to the home-rule cities in many respects, the state retained a general power of control, such that the

home-rule city could not assert a claim under the Fourteenth Amendment against the state or any of the state's political subdivisions). The Cities have cited no authorities that have expressed any view to the contrary, and have given this Court no reason to invest its resources in an exploration of the implications of home-rule status under Colorado law. *See* Pet. at 21.

D. The Cities' distinction between a municipality's "proprietary" and "governmental" capacities raises only state-law issues that are inappropriate for this Court's review.

The Cities contend that they "are acting in their proprietary capacity as the owners and developers of decreed conditional water rights" under Colorado law, and therefore must, under Colorado law, "be treated essentially the same as a private corporation." *See* Pet. at 21-22. They suggest that—under this alleged Colorado rule of "essentially equal treatment"—if a private corporation can assert a takings claim against the state, then *they* should be permitted to assert *their* takings claims as well. *Id.* at 22. They apparently think that this Court is the appropriate forum in which to vindicate their contentions.

The Cities are, of course, mistaken. First, as the Colorado Court of Appeals recognized, *see* Pet. App. 31a, the governmental/proprietary distinction arises out of state common law, and in Colorado, its viability is open to serious question. *See City and County of Denver v. Mountain States Tel. & Tel.*, 754 P.2d 1172, 1173-76 (Colo. 1988). Moreover, as the Colorado Supreme Court has observed, *ibid.*, the distinction cannot be applied with a broad brush. Thus, a municipality's operation of a waterworks may be considered an exercise of its proprietary capacity in a case that concerns the provision of water to persons living outside city limits, but may at the same time be considered an exercise of its governmental capacity in cases involving the construction and relocation of facilities for treating or transporting water. *See id.* at 1775-77. In the instant case, the Cities have cited no

cases to support their contention that their planning or construction of extraterritorial waterworks is carried out in their proprietary capacity, nor have they provided any authority for the contention that Colorado municipalities engaged in proprietary functions thereby acquire rights against uncompensated takings that are enforceable under the Fourteenth Amendment. Furthermore, as the Colorado Court of Appeals noted, Pet. App. at 31a-32a, this Court has already rejected the governmental/proprietary distinction as a basis for permitting a municipality to assert Fourteenth Amendment rights. *See City of Trenton*, 262 U.S. at 188-92; *see also City of Charleston v. Public Serv. Comm'n*, 57 F.3d 385, 388-89 (4th Cir. 1995) (pointing out that this Court in *City of Trenton* "soundly rejected" the governmental/proprietary distinction in the context of a city's assertion of constitutional claims against its "creator" state). The Cities have given this Court no reason to revisit the governmental/proprietary distinction here.

E. Even if the Cities arguably had standing to assert takings claims, Eagle County's denial of a permit here clearly did not amount to a taking.

As discussed above, Eagle County believes that there are no difficult or substantial questions of federal law raised by the ruling of the Colorado Court of Appeals denying that the Cities had standing to assert their takings claims. For the sake of completeness, however, Eagle County would also point out "the propriety of avoiding difficult standing questions when, as here, even assuming a party has standing, it 'has not made a case' for the relief sought." *City of Charleston*, 57 F.3d at 390 n.5 (quoting *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 89 (1970)). In this case, the Cities' takings claims are based solely on Eagle County's denial of a permit for a single, specific water project that the Cities had proposed. Eagle County has not indicated that it will reject any alternative proposals that would

allow the Cities to exercise their water rights within the Eagle River Basin; indeed, the Cities themselves precluded any consideration of alternatives through their successful motion *in limine*. *See supra* pp. 4-5. But "[i]t follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted . . . . A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Because the Cities' takings claims have clearly been asserted prematurely, *cf. id.*, 477 U.S. at 351-52 (regulatory taking not established where county board of supervisors had merely denied one proposal for subdividing the subject property), this case presents a singularly unattractive vehicle by which to resolve any standing issues that have been raised. *Cf. Secretary of the Navy v. Avrech*, 418 U.S. 676, 677-78 (1974) ("[W]e are unwilling to decide the difficult jurisdictional issue which the parties have briefed. . . . We believe that even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits is . . . foreordained.").

II. THE CITIES' CLAIM THAT FEDERAL LAW PREEMPTS EAGLE COUNTY'S REGULATIONS, WHICH WAS "NOT PRESSED OR PASSED UPON BELOW," RAISES NO ISSUES FOR THIS COURT'S REVIEW.

A. Because the Cities' claim of pre-emption was not pressed or passed upon in the Colorado appellate courts below, there is no basis for this Court's review of the claim under 28 U.S.C. § 1257.

This Court's certiorari jurisdiction over decisions from state courts derives from 28 U.S.C. § 1257, which provides that "[f]inal judgments or decrees rendered by the

highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari" where a federal question has been raised. *See* 28 U.S.C. § 1257. "[W]ith very rare exceptions," this Court has refused to exercise its jurisdiction under § 1257 to consider petitioners' claims that were not raised or addressed in the state courts below. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *see also Illinois v. Gates*, 462 U.S. 213, 217-24 (1983) (discussing "the so-called 'not pressed or passed upon below' rule" governing this Court's exercise of jurisdiction under § 1257). A brief review of the record below demonstrates the absence of a reviewable ruling here on the claim of federal pre-emption.

At the district court level, the Cities challenged Eagle County's actions on the grounds of pre-emption. The District Court ruled in favor of the Cities in part, holding that certain criteria used by Eagle County in denying the permit were, in fact, pre-empted. Pet. App. 184a-86a. The District Court, however, found that other criteria utilized by Eagle County were not pre-empted. Specifically, the District Court found that Eagle County had the right to deny the Cities' application on evidence of unacceptable environmental damage to wetlands and aquatic habitats. Pet. App. 186a-87a.

Eagle County appealed that portion of the District Court's judgment that found certain of its criteria pre-empted. Pet. App. 240a-41a. The Cities, however, did not challenge the District Court's ruling that Eagle County's criteria concerning environmental damage to wetlands and aquatic habitats were not pre-empted. Pet. App. 242a-43a. In its opinion, the Colorado Court of Appeals found that it did not need to decide the issue of federal pre-emption raised by Eagle County, because the criteria that the District Court had found not to be pre-empted provided adequate grounds for reversing the District Court and upholding Eagle County's actions. Pet. App. 8a. Of course, because the Cities had not chal-

lenged the District Court's ruling against pre-emption of Eagle County's environmental criteria relating to wetlands and aquatic habitats, the Court of Appeals never considered or ruled on that issue.

In apparent recognition of their failure to appeal the District Court's ruling that Eagle County's environmental regulations relating to wetlands and aquatic habitats were *not* pre-empted, the Cities attempt to bring the issue before this Court based on Eagle County's appeal of the District Court's holding that certain *other* regulations *were* pre-empted.[1] Indeed, the Cities acknowledge that there was no appellate ruling on the pre-emption issue that they are now raising when they state that "by *implicitly assuming* that federal law did not preempt the county's denial decision, the Colorado Court of Appeals' opinion clashes with decisions by the Ninth Circuit and this Court." Pet. at 14 (emphasis added). Moreover, in their petition for certiorari to the Colorado Supreme Court, the Cities expressly acknowledged that the Court of Appeals did not "even reach this issue." Pet. App. 267a.[2] The

[1] To provide documentary support for the contention that their pre-emption issue was raised below, the Cities rely on some creative cutting and pasting of Eagle County's notice of appeal to the Colorado Court of Appeals. Either inadvertently or deliberately, when the Cities cut and pasted the notices of appeal for the appendix to their petition, they left out any indication of which party's notice of appeal raised an issue of federal pre-emption. *See* Pet. App. 240a-41a. In fact, the notice of appeal that included the issue of federal pre-emption was Eagle County's. In the notice of appeal filed by the Cities, federal pre-emption was not raised. *See* Pet. App. 242a-43a.

[2] Once again, through creative cutting and pasting, the Cities attempt to create the impression that they presented the issue of federal pre-empion for review—this time in their petition to the Colorado Supreme Court. Yet, the only reference to federal pre-emption in their nineteen-page petition to the Colorado Supreme Court is the one sentence that they have now pasted in their appendix under the heading of "Issues Presented for Review." *See* Pet. App. 267a. In fact, this one-sentence "issue" did *not* appear as an "issue presented for review" in the petition to the Colorado

Cities assert that the Court of Appeals "refused" to reach the issue; in truth, the Cities did not ask that the issue be reached.

Accordingly, the Cities have not preserved any issue of pre-emption beyond the District Court. The issue has not been fully briefed or considered in the appellate courts of Colorado, and it would be beyond this Court's jurisdiction to be the first court to review a ruling by the lowest state court of general jurisdiction. Having failed to appeal the District Court's ruling, the Cities are precluded from obtaining this Court's review under 28 U.S.C. § 1257. *See, e.g., Hammerstein v. Superior Court*, 341 U.S. 491, 491-92 (1951). Moreover, this Court has consistently refused to consider issues of federal law on direct review from a state court judgment if, as here, that judgment rests on an adequate and independent state law ground. *Harris v. Reed*, 489 U.S. 255, 260-61 (1989). Nothing unique or special about this case compels deviation from the jurisdictional and prudential limitations on this Court's certiorari review.

B. The District Court ruling against pre-emption does not conflict with a decision of a state court of last resort or a federal court of appeals.

The Cities assert that the Colorado Court of Appeals' "implicit assumption" against pre-emption clashes with the Ninth Circuit's decision in *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979). Even if the Cities had preserved the pre-emption issue for this Court's review, however, that alleged conflict would not merit such review. First, *Ventura County* is inapposite to the facts of this case. In *Ventura County*, the local gov-

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Supreme Court; rather, it appeared on page 13 of the text of that document. Of course, even if the petition to the Colorado Supreme Court had raised pre-emption as an issue for review, that court's denial of discretionary review on the issue would not constitute a ruling on the merits for purposes of this Court's review under § 1257. *See Yee*, 503 U.S. at 533.

ernment had sought what the court described as the "immediate recognition and implementation of its veto power"—"the power of ultimate control"—over a lessee of the federal government. *See* 601 F.2d at 1084-85. Here, however, Eagle County has never contended that it could prohibit or veto the Cities' water project under any circumstances. Rather, as the Colorado Court of Appeals correctly observed, *see* Pet. App. 11a-12a, Eagle County merely sought compliance with its duly authorized and enacted regulations.

Second, in relying upon *Ventura County*, the Cities ignore the more recent Ninth Circuit decision of *Friends of the Earth v. United States Navy*, 841 F.2d 927 (9th Cir. 1988), which upheld regulations similar to Eagle County's. In *Friends of the Earth*, the Ninth Circuit held that a state statute that combined land use and environmental regulations was not pre-empted, because the state regulation did not mandate any particular use of the land, but only imposed conditions to mitigate damage caused by the project. *See* 841 F.2d at 936. Significantly, the Ninth Circuit in *Friends of the Earth* relied heavily upon *California Coastal Commission v. Granite Rock*, 480 U.S. 572 (1987), which was decided by this Court eight years after the Ninth Circuit's decision in *Ventura County*. *Friends of the Earth* is the controlling law of the Ninth Circuit, and the District Court's ruling against pre-emption here is entirely consistent with that opinion.

C. The District Court ruling against pre-emption is consistent with applicable decisions of this Court.

The Cities assert that the "implicit assumption" of the Colorado Court of Appeals against pre-emption clashes with the "direction taken" by this Court in *Granite Rock*. In fact, however, a finding against pre-emption here is entirely consistent with *Granite Rock*.

In the present case, as in *Granite Rock*, the regulations at issue set limitations on the environmental impact of the Cities' project on Eagle County. Although the Cities attempt to characterize this as a "veto" of their project, that characterization is simply not supported by the record. As the Colorado Court of Appeals recognized, *see* Pet. App. 21a, 23a-26a, the Cities themselves precluded any meaningful review of alternative means and methods of developing their water rights with their successful motion *in limine*, which demanded that Eagle County consider no alternatives to their specific proposal. When that proposal failed to comply with applicable regulations, Eagle County was obligated by state statute to reject the application.

Similarly, in *Granite Rock*, the local commission did not seek to veto or prohibit activity; it simply sought the authority to impose certain reasonable environmental controls—an authority that, on its face, could not be said to conflict with federal law. The District Court's recognition that Eagle County could permissibly regulate aspects of the Cities' water project here fully comports with this Court's rulings in *Granite Rock*.

D. The District Court correctly rejected the Cities' blanket claim that Eagle County's environmental regulations were pre-empted.

At the outset, the Cities bore the burden of overcoming the presumption against the pre-emption of Eagle County's regulations. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) (presumption against the pre-emption of state law regulation). The Cities failed to meet that burden.

First, the federal permits issued to the Cities expressly *required* the Cities to comply with all state and local regulations. The Forest Service expressly conditioned the issuance of its grant of an easement on the Cities' meeting "all Federal, State, and local requirements for permitting"

before commencing construction of their project. *See* Pet. App. 63a (Forest Service Record of Decision). In particular, three Eagle County permits, including the one sought by the Cities in the present case, were recognized by the Forest Service as necessary prerequisites. Pet. App. 67a. Similarly, the permit issued by the Department of the Army expressly provided that "this permit does not obviate the requirement to obtain state or local assent required by law for the activity authorized herein." Pet. App. 111a.

Second, the relevant federal statutes likewise expressly preserve Eagle County's right to regulate the environmental impacts of the Cities' project. *See* 33 U.S.C. § 1370 (Clean Water Act preserves rights of states and their political subdivisions to enact more stringent requirements); 33 C.F.R. § 320.4(j) (1993) (same); 43 U.S.C. § 1765(a)(iv) (Federal Land Policy Management Act requires compliance with more stringent state environmental standards as a condition of federal right-of-way permits).

Finally, there is no merit to the Cities' assertion, *see* Pet. at 28-29, that Eagle County's actions conflict with an exemption provided in the Colorado Wilderness Act. The exemption cited by the Cities simply allowed them to construct their water project as if the location of the project had not been designated as a wilderness area. The exemption did not grant them an absolute and unfettered right of development. In fact, the exemption specifically stated that the Cities' rights would not be "prejudiced, *expanded*, diminished, altered, or affected by this Act." Pet. App. 313a (emphasis added). The exemption further stated that it was not to be construed to "*expand*, abate, impair, impede, or interfere with" the construction of the project. *Ibid.* (emphasis added). Nothing in the exemption stated that the Cities would not have to comply with local authority, as the Forest Service and the Army permits expressly required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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